EMILIO GIANNARELLI & ORS.

v.

DARYL G. WRAITH & ORS.

HIGH COURT AUSTRALIA
MC HUGH J
[S. 91/001]
20 FEBRUARY 1991

LEGAL PROFESSION: *Legal professional privilege - Taxation of costs - Production of documents - Right of refusal - Grounds of - Adverse inference - Power of taxing officer to compel production - Right to refuse to tax bill - Entitlement to copies of privileged documents produced to taxing officer - Obligation of taxing officer to make copies available - Natural justice - High Court Rules [Aust], O. 71 r. 19(3).*

In this case, the Registrar, who had sat as a taxing officer, referred to the High Court questions relating to:

1. The power of the taxing officer to require the respondents to produce documents for the purpose of determining if there was a binding agreement between the respondents and their solicitors that the respondents would not have to pay to the solicitors the costs of the proceedings in the High Court;
2. the right of the respondents to refuse to produce the documents on the ground that they are the subject of legal professional privilege;
3. the power of the taxing officer to compel production of the documents and his right to refuse to tax the respondents' bill of costs until the documents are produced and;
4. the right of the taxing officer to give the appellants copies of any documents which the respondents produce.

Held:

[1] The power of the taxing officer to require production of papers and documents (the said documents) under 0. 71 r. 70 of the Rules of High Court (the Rules) is conditional upon any request being "for the purpose of taxation of costs". Once the taxing officer believes that the production of documents may help him or her to resolve a factual issue arising in the course of taxation, the requirement to produce the documents is "for the purpose of taxation of costs" and falls within the rule.

[2] Although in this case, the evidence before the taxing officer did not come anywhere near proving the agreement alleged, it was a matter for the taxing officer whether on that evidence, he should exercise the power and it cannot be said that in acting on that evidence, he was acting unreasonably or capriciously. Therefore, the taxing officer acted within power when he called for production of the documents by the respondents' solicitors.

[3] The case of *Baker v. Campbell* decided that a claim for legal professional privilege can be made in administrative as well as judicial and quasi-judicial proceedings and therefore, this privilege can be claimed in relation to taxation of costs.

[4] Although the respondents are entitled to refuse to produce to the taxing officer any of the said documents on the grounds of legal professional privilege, the respondents cannot claim this privilege without stating any ground whatsoever for their refusal.

[5] The taxing officer cannot compel production of privileged documents. However, the failure of the party taxing the bill to produce legally privileged documents is no ground for the taxing officer refusing to tax the bill. No adverse inference to the respondents can be drawn from their reliance on legal professional privilege.

[6] On the question of whether the taxing officer is entitled or obliged to make copies of the documents available to the appellants notwithstanding objection from the respondents, ultimately, a party either waives the privilege and allows the taxing officer and the other side to see the privileged documents or asserts the privilege and maintains the confidentiality of his or her documents.

[Matter remitted to the taxing officer to be dealt with.]

Cases referred to:
Adams v. London Improved Motor Coach Builders Ltd. [1921] 1 KB 495 ***(cit)***
Baker v. Campbell [1983] 153 CLR 52 ***(foll)***
Davies v. Taylor (No. 2) [1974] AC 225 ***(cit)***
Goldman v. Hesper [1988] 1 WLR 1238; [1988] 3 All ER 97 ***(cit)***
Hobbs v. Hobbs & Cousens [1960] P 112 ***(cons)***
Hudgson v. Endrust (Australia) Pty. Ltd. [1986] 11 FCR 152 ***(cit)***
Pamplin v. Express Newspapers Ltd. [1985] 1 WLR 689; [1985] 2 All ER 185 ***(cons)***
Reg. v. Miller [1983] 1 WLR 1056; [1983] 3 All ER 186 ***(dist)***
Wentworth v. Lloyd [1864] 10 HLC 589 ***(cit)***

Legislation referred to:
High Court Rules [Aust], 0. 71 rr. 19(3), 70
Rules of the Supereme Court [UK], 0. 62 rr. 20(d), 21(5)(b), 29(7)

For the appellants - Sheehan, (Privitelli & Di Mauro Pty. with him)
For the respondents - Arthur Robinson (Hedderwicks with him)

JUDGMENT

McHugh J:

The Registrar, sitting as a taxing officer, has referred to me four questions arising in a taxation of costs in the Court. The reference was made pursuant to 0. 71 r. 19(3) of the High Court Rules (the Rules). The first question concerns the power of the taxing officer to require the respondents to produce documents for the purpose of determining if there was a binding agreement between the respondents and their solicitors that the respondents would not have to pay to the solicitors the costs of the proceedings in this Court. The second question concerns the right of the respondents to refuse to produce the documents on the ground that they are the subject of legal professional privilege. The third question concerns the power of the taxing officer to compel production of the documents and his right to refuse to tax the respondents' bill of costs until the documents are produced. The fourth question concerns the right of the taxing officer to give the appellants copies of any documents which the respondents produce.

The Background to the Questions

On 13 October 1988, this Court dismissed an appeal by the appellants against an order of the Supreme Court of Victoria and ordered that they pay the respondents' costs of the appeal. The respondents submitted for taxation a bill of costs totalling $44,159.23. The appellants raised a number of general objections to the bill. But the principal objection was that the respondents were not entitled to recover the costs of the appeal because they were never at

risk in respect of costs. The basis of this contention was that the costs were, and always were intended, to be fully paid by the respondents' insurer. Since a party cannot recover costs if that party is not liable in any circumstances to pay his or her solicitors' costs, the taxing officer had to determine whether there was an agreement between the respondents and their solicitors that the respondents would not have to pay their solicitors' costs in any event. (See generally *Adams v. London Improved Motor Coach Builders Ltd.* [1921] 1 KB 495; *Davies v. Taylor (No. 2)* [1974] AC 225.)

At the request of the taxing officer, both parties made written submissions in respect of the preliminary objections raised by the appellants. After considering these submissions, the taxing officer formed the opinion that it would be necessary for him to have more factual material before he could make a decision. On 19 April 1990, he wrote to the solicitors for the respondents requesting that the respondents produce at the taxation the following documents:

(a) a copy of the insurance policy between the respondents and their solicitors;

(b) all correspondence between the respondents and their solicitors concerned with the solicitors' retainer to act on their behalf in respect of the proceedings in the High Court;

(c) all correspondence (if any) between the respondents' solicitors and the respondents' insurer pertaining to the conduct of the proceedings in the High Court;

(d) all correspondence (if any) between the respondents and their insurer pertaining to the conduct of the proceedings in the High Court;

(e) all accounts rendered by the respondents' solicitors in respect of the proceedings in the High Court.

The taxation of costs formally commenced in Melbourne on 26 April 1990. During the hearing, the respondents filed on affidavit of Ian Peter Scott O'Donahoo, a solicitor in the employ of the solicitors for the respondents, in which he deposed:

> 2. I have perused my principals' files in relation to the conduct of the proceedings instituted by the appellants/plaintiffs. This matter has been run as a single file on the respondents' behalf. From time to time, interim solicitor client bills detailing professional costs and disbursements incurred in acting on the respondents' behalf have been rendered by my principals and paid in full. The amounts paid pursuant to these interim solicitor client bills of professional costs and disbursements exceed the sum of the professional costs and disbursements claimed in the party bills of costs filed in this Honourable Court and the Supreme Court of Victoria.
>
> 3. I am informed by Andrew Morris Robson, and I verily believe, that there is no agreement pursuant to which my principals have foregone their right to recover the professional costs and disbursements incurred in acting on the respondents' behalf.

Counsel for the respondents submitted that the affidavit proved that there was no agreement between the respondents and their solicitors that the respondents would not be liable in any circumstances to pay their solicitors' costs. Counsel for the respondents also informed the taxing officer that the respondents would not produce the documents requested in paras. (b), (c), (d) and (e) in the letter of 19 April 1990. He submitted that the taxing officer had no power to direct or require production of the documents. He contended that the Rules enable the taxing officer to inspect documents which are the subject of claim for costs but do not entitle the taxing officer to call for and to inspect documents in relation to which no claim for costs is made. In the alternative, he contended that, if the taxing officer did have the power to direct or require the production of the documents requested, then

Mr. O'Donahoo's affidavit should satisfy him that there was no agreement of the type suggested by the appellants. If the taxing officer had further doubts, Counsel for the respondents submitted that he should resolve them by summoning Mr. O'Donahoo or Mr. Robson or both of them for examination.

In his reasons for decision dated 23 May 1990, the taxing officer stated that, pursuant to O. 71 r. 71 of the Rules, he had the power to order production of the documents referred to in the letter of 19 April 1990. He also said:

> Mr. O'Donahoo's affidavit does nothing to satisfy me that there was no agreement binding on the solicitors that the respondents would not have to pay the costs in any event. There remains a doubt in my mind that I have been provided with sufficient information with which to make a considered decision that no agreement of the kind alleged by the appellants is in existence.

Accordingly, the taxing officer directed the solicitors for the respondents to produce those documents which came within any of the five categories set out in the letter of 19 April 1990.

In a letter dated 8 June 1990, the respondents' solicitors stated that they had no documents which came within category (a). They enclosed with the letter documents which came within categories (d) and (e). They refused to produce documents in their possession which came within categories (b) and (c) on the ground that the documents were protected from production by legal professional privilege.

On 31 July 1990, the taxing officer heard further argument from the parties in respect of the question of legal professional privilege. Subsequently, he referred four questions to me pursuant to O. 71 r. 19(3) of the Rules:

Question 1

Question 1 asks:

> On the basis of the evidence before the taxing officer, is he entitled to require the respondents to produce to him:
>
> (a) a copy of the insurance policy between the respondents and their solicitor;
>
> (b) all correspondence between the respondents and their solicitors concerned with the solicitors' retainer to act on their behalf in respect of the proceeding in the High Court;
>
> (c) all correspondence (if any) between the respondents' solicitors and the respondents' insurer pertaining to the conduct of the proceedings in the High Court;
>
> (d) all correspondence (if any) between the respondents and their insurer pertaining to the conduct of the proceedings in the High Court;
>
> (e) all accounts rendered by the respondents' solicitors in respect of the proceedings in the High Court;
>
> for:
>
> (i) the purpose of determining if there was no agreement binding on the solicitors that the respondents would not have to pay the costs of the proceedings in the High Court in any event,
>
> (ii) any other (purpose) and, if so, what purpose?

Order 71 r. 70 of the rules provides:

> The taxing officer may, for the purpose of taxation of costs:
>
> (a) summon and examine witnesses either orally or upon affidavit;
>
> (b) administer oaths;
>
> (c) direct or require the production of books, papers and documents;
>
> (d) issue subpoenas;
>
> (e) make separate or interim certificates or allocaturs;
>
> (f) require a party to be represented by a separate solicitor; and
>
> (g) do such other acts and direct or take all such other steps as are directed by these rules or by the Court or a justice.

The power of the taxing officer to require the production of papers and documents under this rule is conditional upon any request being "for the purpose of taxation of costs". But once the taxing officer believes that the production of documents may help him or her to resolve a factual issue arising in the course of the taxation, the requirement to produce the documents is "for the purpose of taxation of costs" and falls within the rule.

Question 1, however asks whether "on the basis of the evidence" before the taxing officer he is entitled to require production of the documents. The only "evidence" submitted by the appellants in support of the allegation that the respondents are or were not liable to pay their solicitors' costs in this Court is contained in the bill of costs filed in the action in the Supreme Court of Victoria. According to the written submissions of the appellants, the bill shows that the respondents' solicitors "sought and receive(d) instructions from a person other than the respondents and referred to as the insurer and reported regularly to the insurer" and that the bill of costs filed for taxation in this Court confirms "the continuity of the relationship disclosed in the Supreme Court Bill of Costs". In those submissions the appellants, in support of an allegation of maintenance which was raised before the taxing officer but not before me, also state that the Supreme Court bill "discloses attendances on Counsel and insurer 'as to figure out the commercial impact of Mr. Justice Marks' decision on insurance for barristers". The "evidence" relied on by the appellants, however, falls far short of establishing that the respondents and their solicitors have entered into an agreement whereby the respondents did not have to pay their solicitors' costs in any circumstances.

The respondents, of course, rely on the affidavit of Mr. O'Donahoo. His affidavit, however, does not address the central dispute in the taxation, that is, whether the solicitors have foregone their right to recover their costs from the respondents. The respondents also rely on the fact that, as was pointed out in *Davies v. Taylor (No. 2)* (at p. 234), an agreement of the sort alleged by the appellants "would be most unusual". There is a presumption, therefore, that such an agreement does not exist: *Reg. v. Miller* [1983] 1 WLR 1056, at p. 1061; [1983] 3 All ER 186, at p. 190; *Hudgson v. Endrust [Australia] Pty. Ltd.* [1986] 11 FCR 152, at pp. 154-155.

The respondents submit that on the evidence the taxing officer was not entitled to exercise his power under O. 71 r. 70. They submit that a taxing officer should only require production of documents under that rule when production is necessary to obtain information in order to make a decision and that there must be a genuine dispute, "not a sham or fanciful dispute": *Pamplin v. Express Newspapers Ltd.* [1985] 1 WLR 689, at p. 696; [1985] 2 All ER 185, at p. 190. They contend that in this case the taxing officer could not exercise the power unless

there was some evidence before him that would cause him to doubt that the respondents are liable for their solicitors' costs and require him to explore the matter further. They rely on *Miller* where Lloyed J said (at p. 1061; p.191 of All ER):

> If it appears to the taxing officer that there is doubt whether there was an express or implied agreement, binding on the solicitors, not to seek to recover the costs from the client, the taxing officer should ask for further evidence.

The respondents argue that, despite the taxing officer's statement that he had a doubt about the matter, he could not reasonably entertain such a doubt.

However, the statements in *Miller* are not necessarily applicable in this Court. In England, the taxing officer peruses the whole of the solicitor's file before he or she decides to exercise the power under O. 62 r. 20(d) of the Rules of the Supreme Court to:

> order the production of any document which may be relevant in connection with those proceedings.

See O. 62 r. 29(7) of the Supreme Court Rules; *Miller*, at p. 1061; p. 191 of All ER. In those circumstances, it is not surprising that in England a taxing officer will look for "further evidence" to support an allegation made by a party in the taxation. However, in taxation proceedings in this Court, the claimant's solicitor is not required to produce a file. Furthermore, discovery is not available in a taxation of costs. Moreover, the taxing officer can exercise his or her power under O. 71 r. 70 of his or her own motion. If the taxing officer thinks that there is a genuine factual issue between parties, then, in my opinion, he or she can exercise the powers under O. 71 r. 70. As long as the taxing officer exercises those powers "for the purpose of taxation of costs", and not capriciouly or unreasonably, he or she need not have any evidence before him or her. As Hobhouse J said in *Pamplin* (at p. 697; p. 191 of All ER):

> it is well within the discretion and expertise of the matter to decide when there is in truth a factual issue which needs to be decided, and therefore calls for the adducing of evidence by the claimant. It is essential to the efficient and economic conduct of the taxation that the master should have this discretion.

The "evidence" before the taxing officer in the present case did not come anywhere near proving the agreement alleged. At best the "evidence" was equivocal. But it was a matter for the taxing officer's discretion whether on that "evidence" he should exercise the power. It cannot be said that in acting on that "evidence" he was acting unreasonably or capriciously.

Accordingly, the taxing officer acted within power when he called for production of the documents by the respondents' solicitors.

Question 1 should be answered: yes.

Question 2 asks:

> Are the respondents entitled to refuse to produce to the taxing officer any of the documents referred to in question 1:
>
> (a) on the grounds that such documents are subject to the benefit of legal professional privilege;
>
> (b) without stating any ground whatsoever?

The respondents are not entitled to refuse to produce to the taxing officer any of the documents referred to in question 1 without stating the ground of refusal. However, they can refuse to produce the documents on the ground that the documents are subject to the benefit of legal professional privilege. *Baker v. Campbell* [1983] 153 CLR 52 decides that a

claim of legal professional privilege can be made in administrative as well as judicial and quasi-judicial proceedings. It follows that such a claim can be made in a taxation of costs. As Deane J said in *Baker v. Campbell* (at pp. 115-116):

> Once one recognises that the principle underlying legal professional privilege is that a person should be entitled to seek and obtain legal advice without the apprehension of being prejudiced by subsequent disclosure of confidential communications and that the privilege is not confined to such communications as are made in the course of or in anticipation of litigation but extends generally to confidential communications of a professional nature between a person and his lawyer made for the purpose of obtaining or giving legal advice, common sense points to a conclusion that the principle should not be seen as restricted to compulsory disclosure in the course (judicial or quasi-judicial) proceedings. Indeed the doctrine of legal professional privilege would represent an aberration of the common law if it withheld from the Courts information or documents which were material in the search for truth in circumstances where the disclosure thereof could be compelled as a matter of course by any administrative officer with a relevant and general statutory mandate to require the provision of information or the production of documents.

Moreover, in *Hobbs v. Hobbs and Cousens* [1960] p. 112, *Goldman v. Hesper* [1988] 1 WLR 1238; [1988] 3 All ER 97 and *Pamplin* it was assumed that a party to a taxation of costs can assert legal professional privilege. However, in each of those case, the party had disclosed the privileged documents to the taxing officer and only sought to rely on the privilege for the purpose of preventing the other party seeing the documents. The other party, relying on the principles of natural justice, had asserted a right to examine all documents submitted to the taxing officer. The Courts resolved this tension between natural justice and legal professional privilege in varying ways but never denied that legal professional privilege could be asserted in taxation proceedings. In *Hobbs*, Stevenson J said (at p. 117)

> There is, however, an abundance of authority in support of the proposition that once legal professional privilege attaches to a document ... that privilege attaches for all time and in all circumstances.

In *Pamplin*, an appeal was still pending and Hobhouse J was conscious of the need to maintain confidentiality in those circumstances. His Lordship said (at p. 698; p. 192 of All ER):

> In the most extreme case, the claimant may have to ask for an adjournment of the taxation (or review) of some items until a time when the privilege has become academic, for example, the disposal of a pending appeal in the litigation.

In this passage his Lordship was not suggesting that, once the litigation has come to an end, privilege can no longer be claimed in the taxation of costs. Rather, he was suggesting that, at that late stage, a party would usually have no interest in maintaining the confidentiality of his or her privileged documents.

Question 2 should be answered:

(a) yes;

(b) no.

Question 3

Question 3 asks:

> In the event that the respondents refuse to produce to the taxing officer any or all of the documents referred to in question 1:

(a) is the taxing officer empowered to compel production of all the documents;

(b) is the taxing officer entitled to refuse to tax the respondents' bill of costs until production of the documents or such of them as he is empowered to require the respondents to produce?

Obviously, the taxing officer cannot compel production of privileged documents. However, the consequences of a party's refusal to produce documents on the ground of legal professional privilege are not clear. The appellants contend that the respondents are not entitled to their costs if they do not produce the documents. They rely on *Pamplin* and *Goldman* for this proposition. However, neither of those cases supports the contention.

In *Pamplin*, an order for costs was made in favour of the defendants. At the taxation the plaintiff argued that he was entitled to inspect all the papers which the defendants had lodged under O. 62 r. 21 of the Supreme Court Rules and which therefore had been examined by the taxing master. Order 62 r. 21(5)(b) required that the claimant lodge "the bill of costs together with all necessary papers and vouchers". According to a practice direction ([1979] 1 All ER 958), the necessary papers and vouchers were:

(i) The bill of cost.

(ii) A bundle comprising all civil aid certificates and amendments thereto.

(iii) A certificate of times of a copy of the associate's certificate.

(iv) A bundle comprising Counsel's fee notes and accounts for other disbursements.

(v) One complete set of pleadings arranged in chronological order. To this set should be annexed any interlocutory summonses and lists of documents.

(vi) Cases to Counsel to advise with his advices; opinions and instructions to Counsel to settle documents and briefs to Counsel with enclosures, all arranged in chronological order.

(vii) Reports and opinions of medical and other experts arranged in chronological order.

(viii) The solicitor's correspondence and attendance notes. Files should be left intact and not for the purpose of taxation divided into different sections to relate to different portions of the bill.

(ix) Any additional papers should be bundled and so labelled.

The plaintiff argued that the principles of natural justice required that he be allowed to inspect these documents so that he could properly present his case about the propriety or otherwise of the items charged in the defendant's bill. As an appeal was pending, the defendants objected to the plaintiff's demand to examine their privileged documents. Hobhouse J said (at p. 695; p. 190 of All ER) that:

> Ultimately, the principle that each party must have the right to see any relevant material which his opponent is placing before the tribunal, and which that tribunal is taking into account in arriving at its decision, must prevail (over the principle of legal professional privilege). In the final resort, the claimant must be put in his election whether he wishes to waive his privilege and use the material, or to assert his privilege and retain the confidentiality of the document which the respondent is asking to see.

However, his Lordship believed that this point would rarely be reached. He said that usually the parties are content to trust the expertise of the taxing master and see no need to examine documents supplied to the taxing officer. Further, genuine disputes requiring the paying party to examine the documents do not usually arise. Hobhouse J said that no question of waiver of privilege arose in the case before him because the plaintiff's request to examine the

documents was unnecessary for the fair disposal of the matter; Counsel for the plaintiff was unable to explain why he needed to see the documents. His Lordship held that disclosure of the documents to the taxing officer did not amount to waiver of the privilege. However, he said (at pp. 696-697; pp. 190-191 of All ER) that, if a genuine factual issue does arise on taxation:

> The claimant then has to choose what evidence he will adduce and to what extent he will waive his privilege. That is a choice for the claimant alone. The master then has to decide the issue of fact on the evidence. In considering whether he is satisfied by the evidence, the master will no doubt take into account that the claimant may have a legitimate interest in not adducing the most obvious or complete evidence, and may prefer to rely on oral evidence rather than producing privileged legal documents.

The facts in *Goldman* were very similar. An order for costs was made in favour of the defendant who filed her bill of costs and lodged the papers required by O. 62 r. 29(7) which was in accord with the practice direction set out above. The plaintiff's request to inspect the papers was rejected. In the Court of Appeal, the argument of plaintiff was summarised by Taylor LJ (at p. 1243; p. 101 of All ER) as follows:

> openness of justice should prevail so that the paying party should see such documents as are necessary to enable him to challenge the bill if appropriate. 'Can't see - won't pay' is the terse expression of that argument.

Taylor LJ said (at p. 1244; pp. 101-102 of All ER) that on the occasion when a problem arises:

> the taxing officer has the duty of being fair to both parties: on the one hand, to maintain privilege so far as possible and not disclose the contents of a privileged document to the paying party unnecessarily; on the other hand, he has to see that that party is treated fairly and given a proper opportunity to raise a *bona fide* challenge. There may be instances in which a taxing officer may need to disclose part, if not all, of the contents of a privileged document in striking the appropriate balance. He will no doubt use all his expertise and tact in seeking to avoid that situation wherever he can. I do not envisage it occurring, except very rarely. Of course it is always open to the claimant not to rely on privileged documents which he regards as peculiarly sensitive.

Taylor LJ concluded (at p. 1245; p. 102 of All ER) that, in the circumstances of the case, the taxing officer's refusal to allow the plaintiff to inspect the defendant's privileged documents was "fair and reasonable". Lord Donaldson of Lymington MR and Woolf LJ agreed with Taylor LJ.

These are a number of obvious and important differences between these two English cases and the present case. In the English cases, legal professional privilege was relied upon to prevent the party who had to pay the costs from seeing the documents. The claimant in each case had already disclosed the documents in question to the taxing officer; that disclosure was not considered to be a waiver of the privilege. Further, the party claiming legal professional privilege was also the party who sought to prove a fact by use of the privileged documents. The suggestion in *Pamplin* that, if privilege is not waived, the claimant will be penalised is attributable to this point. In the present case, however, the party relying on legal professional privilege (the respondents) is not seeking to prove a fact by the use of the privileged documents. These differences alone make it difficult to apply the reasoning in the English cases to this particular fact situation. Moreover, those cases do not support the basic proposition of the appellants that the respondents must elect to waive their privilege or to have the taxation of the bill of costs rejected.

What the English cases show is that a party cannot be compelled to waive his or her privilege. They also show that, if a party elects to rely on privilege, that person will often risk not being able to prove a claim because the taxing officer can only decide the claim on the basis of the evidence before him or: see *Pamplin*, at pp. 696-696; pp. 190-191 of All Er. The failure of the party taxing the bill to produce legally privileged documents is no ground, however, for the taxing officer refusing to tax the bill. To require a party to waive his or her privilege or forfeit a claim to $44,159.23 would be to make the privilege meaningless.

In the present case, the respondents have asserted their privilege and chosen to rely on the affidavit of Mr. O'Donahoo. His affidavit is conspicuous for its omission to deal with the central point at issue in the proceedings. In those circumstances, the taxing officer has to decide, on all the "evidence" before him, whether there was an agreement between the respondents and their solicitors that the respondents would not be liable for their solicitors' costs in any event. No inference adverse to the respondents can be drawn from their reliance on legal professional privilege: *Wentworth v. Lloyd* [1864] 10 HLC 589.

Question 3 should be answered:

(a) no;

(b) no.

Question 4

Question 4 asks:

> Upon production of the documents, if any, is the taxing officer entitled or obliged to make copies of the documents available to the appellants or their legal advisers notwithstanding objection from the respondents to such being done?

In light of the answer to the previous questions, this question is probably hypothetical. However, if the respondents do produce documents which are not privileged, they cannot, in accordance with the principles of natural justice, prevent the appellants seeing them. As was said in *Pamplin* (at p. 691; p. 186 of All ER):

> Natural justice requires that each party should have an equivalent right to be heard. This means that if one party wishes to place evidence or persuasive material before the tribunal, the other party or parties must have an opportunity to see that material, and if they wish, to submit counter material and, in any event, to address the tribunal about the material. One party may not make secret communication to the Court.

Likewise, if the respondents produce privileged documents, they cannot object to the taxing officer showing the documents to the appellants.

As I have already said, the conflict between natural justice and legal professional privilege arose in *Hobbs, Pamplin* and *Goldman*. In *Hobbs*, a husband had successfully sued for divorce and an order was made that the co-respondent should pay the costs of the suit. The husband's bill of costs for taxation included an item of "instruction for brief" amounting to 200 guineas. During the taxation, the co-respondent asked to be allowed to inspect the brief which had been delivered to Counsel for the husband in order that he might contest items in the bill, particularly the 200 guineas for instructions for brief. Stevenson J held that the brief was privileged and that the co-respondent could not see it. He said that the co-respondent would not be assisted by seeing the brief and that the taxing officer could be trusted to properly scrutinise the brief to make sure that it was not overloaded with surplus matter. In *Goldman* (at p. 1244; p. 102 of All ER) this approach was criticised as "too rigid and uncompromising".

In *Pamplin*, Hobhouse J said that the conflict between privilege and natural justice is usually avoided because of the flexibility and informality of taxation proceedings. When it does arise, however, the rules of natural justice must prevail. He concluded that, if a claimant wished to rely on his or her privileged documents to support a claim for costs, then the claimant waives the privilege and must let the opposing party see the documents. Alternatively, if the claimant asserts the privilege, he or she risks not being able to prove the claim.

In *Goldman*, a flexible approach was advocated. Taylor LJ said it is the duty of the taxing officer to strike the appropriate balance between the two opposing legal principles. The results will vary with the facts of each case. Occasionally part of a privileged document may have to be revealed to the opposing party but the claimant may always choose not to rely on privileged documents which are particularly confidential.

In the present case, unlike the English cases, the initial disclosure to the taxing officer must amount to waiver of privilege. *Goldman* can be read as suggesting that, even when privilege has been waived, the taxing officer may still prevent the other party seeing the document. But in *Pamplin* expressly and in *Goldman* by inference, the Court said that ultimately a party either waives the privilege entirely and allows the taxing officer and the other side to see the privileged documents or asserts the privilege and maintains the confidentiality of his or her documents. This is the only acceptable view.

Accordingly, in this case, if the respondents decide to disclose privileged documents to the taxing officer, he is obliged to make copies of the documents available to the appellants.

Question 4 should be answered: yes.

Also found at [1991] 3 CLJ 1659